Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of AMERITECH CORP., Transferor, AND SBC COMMUNICATIONS INC. Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules	CC Docket No. 98-141

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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July 19, 1999

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SUMMARY

The Telecommunications Resellers Association, a national trade association representing more than 800 entities engaged in, or providing products and services in support of, telecommunications resale, hereby submits the following comments addressing the various conditions offered by SBC Communications Inc. and Ameritech Corporation in an effort to mitigate the competitive harms that would be occasioned by the merger of what are now the second and fourth largest of the five remaining Bell Operating Companies into the nation's largest incumbent local exchange carrier . While TRA commends the Commission for its ongoing efforts to blunt and/or compensate for the adverse impact a combination of SBC and Ameritech would have on nascent local exchange/exchange access competition, TRA is deeply concerned that not only do the merger conditions proposed by SBC and Ameritech not achieve this laudable end, but that certain of these conditions would actually have the opposite effect.

Easily the most dangerous and disturbing of the merger conditions proposed by SBC and Ameritech are those involving the regulatory treatment of advanced services as provided by one or more affiliates of the merged entity. In TRA's view, the manner in which SBC/Ameritech advanced services affiliates would be structured and operated under the proposed merger conditions is not only contrary to the public interest, but is in fact unlawful. Simply through use of an affiliate, SBC and Ameritech would relieve the merged entity of its Section 251(c)(4) resale obligations as they apply to advanced services , violating a clear Congressional mandate that the Commission not forbear from strict application of the requirements of Section 251(c) until such provision has been fully implemented, and conflicting with central tenets of the Telecommunications Act of 1996. The

Commission cannot accomplish indirectly what the Congress has forbidden it to do directly. An advanced services affiliate of a merged SBC/Ameritech, having assumed the mantel of its parent as to these services, must be deemed an incumbent LEC for purposes of applying the Section 251(c)(4) resale obligations.

The remaining merger conditions proposed by SBC and Ameritech can be divided into four relatively distinct categories: (i) pro-competitive conditions which generally require some measure of enhancement to accomplish their intended purpose; (ii) conditions which merely restate existing requirements, which the Commission could unilaterally impose, or which could be imposed on the basis of existing records in current Commission proceedings; (iii) conditions which simply confirm the inevitable working of market forces; and (iv) pro-consumer conditions which, while positive, do not impact the competitive calculus. TRA submits that even if modified so as to be rendered more effective, the remaining proposed merger conditions are inadequate to counter-balance the competitive harms that would be occasioned by the proposed merger of SBC and Ameritech. Unmodified, the remaining proposed merger conditions provide, at best, minimal mitigation of these harms. Coupled with the Section 251 relief embodied in the regulatory treatment proposed by SBC/Ameritech of advanced services affiliates, however, the package of merger conditions overall is potentially worse than the imposition of no merger conditions whatsoever, particularly for smaller carriers attempting to compete through local service resale.

Set forth below is a summary scorecard reflecting TRA's assessment of the remaining merger conditions proposed by SBC and Ameritech:

Merger Condition	Assessment
Additional Resale Discounts	Positive development, but minimal mitigative impact due to excessive restrictions
End-to-End UNE Combinations	Positive development, but minimal mitigative impact due to excessive restrictions
Additional Discounts on Unbundled Local Loops	Positive development, but minimal mitigative impact due to excessive restrictions
OSS: Assistance for Small Competitors	Positive development, but meaningful only if accompanied by a serious reorientation in approach to dealing with competitors
OSS: Enhancements and Additional Interfaces	Positive development, but time lags seriously and potentially burdensome cost assessments undermine pro-competitive impacts.
OSS: Waiver of Charges	Positive development which could be significantly improved by extending the waiver to encompass, or at least capping the charges applicable to, non-electronic order submission
Agreements: Out-of-Region and In-Region	Positive development, but mitigative impact diminished by undue conditions
Agreements: Regional	Positive development
Alternative Dispute Resolution	Positive development
Collocation Compliance Plan	Without import; restates existing obligations
Nondiscriminatory Access to Loop Pre-qualification Information	Without import; restates existing obligations
Federal Performance Parity Plan	Could be imposed unilaterally by Commission
Availability of Shared Transport	Record basis exists for unilateral imposition by the Commission

Merger Condition	Assessment
Unbundled Network Access	Record basis exists for unilateral imposition by the Commission
Compliance with Commission Pricing Rules	Record basis exists for unilateral imposition by the Commission
National-Local Strategy	Market driven
Deployment of Advanced Services in Low Income Areas	No competitive impact
No Monthly IntraLATA Charges	No competitive impact
Enhanced Lifeline Plans	No competitive impact

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COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Public Notice, DA 99-1305 (released July 1, 1999), hereby submits the following comments addressing the various conditions offered by SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech") in an effort to mitigate the competitive harms

[1] A national trade association, TRA represents more than 800 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well.

that would be occasioned by the merger of what are now the second and fourth largest of the five remaining Bell Operating Companies ("BOCs") into the nation's largest incumbent local exchange carrier ("LEC").[2] While TRA commends the Commission for its ongoing efforts to blunt and/or compensate for the adverse impact a combination of SBC and Ameritech would have on nascent local exchange/exchange access competition, TRA is deeply concerned that not only do the merger conditions proposed by SBC and Ameritech not achieve this laudable end, but that certain of these conditions, particularly those involving the provision of advanced services, will have the opposite effect. Indeed, in TRA's view, the regulatory treatment of SBC/Ameritech advanced services affiliates proposed in the merger conditions is not only contrary to the public interest, but is in fact unlawful. TRA, accordingly, strongly urges the Commission to rethink and substantially revise the proposed merger conditions before it even contemplates approving the proposed merger of SBC and Ameritech.

I.

INTRODUCTION

In its original comments addressing the proposed SBC/Ameritech merger, TRA argued that in light of SBC's and Ameritech's acknowledgment that each would be driven by business necessity to either combine or to compete against one another in at least the major markets served by the other as the incumbent, the combination of the two would eliminate a future -- but nonetheless inevitable -- significant market participant from their respective local service areas. Moreover, TRA emphasized, the impact of the loss of a potent potential competitor in each of these

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[2] Federal Communications Commission, Preliminary Statistics of Communications Common Carriers, 1998 Edition (May, 1999).

substantial geographic areas would be magnified by the continuing failure of both SBC and Ameritech to fully open their respective local markets to competition. The magnitude of the loss, TRA explained, would stem from the extensive expertise, experience and financial resources each of SBC and Ameritech could bring to bear to force the elimination of persistent economic and operational barriers to local market entry in one another's markets. As TRA pointed out, the Commission has recognized that "even if a new entrant is able merely to 'shake things up' or 'engender competitive motion,' that alone may make a significant contribution to competition."[3]

The merger of SBC and Ameritech, TRA argued, would substitute for two potential competitive providers, a single incumbent serving roughly forty percent of the Nation's telephone lines. The resultant entity, TRA continued, would have "increase[d] . . . ability and incentive to resist the pro-competitive process," with reduced incentives to "break ranks" with other incumbents.[4] Also lost in this exchange, TRA pointed out, were enforcement and ultimately deregulatory opportunities. As the Commission itself has recognized, "[a] reduction in the number of separately owned firms engaged in similar businesses will likely reduce . . . [the] Commission's ability to identify, and therefore, to contain, market power," in so doing "hinder[ing] and delay[ing] the transition to competitive, deregulated telecommunications markets by making it more difficult for the Commission and state regulators to develop and enforce necessary procompetitive rules."[5]

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[3] Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985, ¶ 139 (1997).

[4] Id. at ¶ 154.

[5] Id. at ¶¶ 147, 152.

For these reasons, TRA urged the Commission to scrutinize the proposed merger of SBC and Ameritech more closely than the previous combinations of Bell Operating Companies ("BOCs") sanctioned by the Commission. TRA stressed that the more and larger the combinations of incumbent LECs, the greater the threat to nascent local exchange/exchange access competition and ultimately to competition in the interexchange and other markets. At some point, TRA suggested, the Commission must simply draw the line and refuse to permit further combinations of large incumbent LECs until such time as the incumbents have ceased to be dominant providers in their respective markets. And TRA concluded, given the continuing refusal of the incumbent LECs, including SBC and Ameritech, to fully open their respective local markets to competitive entry, that time is probably now. The Commission should not, TRA declared, sit idly by as resistant monopolists fortify their monopoly bastions against competitive intrusions.

TRA continues to hold these views, having witnessed nothing in the year following the announcement of the proposed SBC/Ameritech merger which suggests that either entity is any more willing than it has been in the past to fully provide for competitive entry into its local services markets. Nonetheless, TRA recognizes, as it did when it first addressed the proposed merger, that Commission approval was likely and, therefore, continues to urge the Commission, if it does sanction the combination, to condition that approval on meaningful actions by SBC and Ameritech to mitigate and offset the resultant competitive harms. Certainly, the Commission should not endorse conditions which would further hinder competition. Some of the conditions proposed by SBC and Ameritech would address, to a greater or lesser degree, the adverse effect of the merger on competition in the SBC and Ameritech regions; others, however, would erect additional barriers to the competitive provision of local service. The former should be retained and, as necessary,

enhanced; the latter should be eliminated and, as appropriate, replaced with pro-competitive conditions.

II.

ARGUMENT

A. The Merger Conditions Must Satisfy The Merger Approval Standards Articulated By The Commission

In approving the merger of the Bell Atlantic Corporation ("Bell Atlantic") and the NYNEX Corporation ("NYNEX"), the Commission made clear that the BOC applicants bore the burden of demonstrating that the proposed combination would further the public interest, convenience and necessity, and that such a demonstration must include a showing that the merger would "enhance and promote, rather than eliminate or retard, competition."[6] Applicants proposing a merger which eliminates "potentially significant sources of the competition that the Communications Act [of 1934 ("Communications Act")], particularly as amended by the Telecommunications Act [of 1996 ("Telecommunications Act")]," sought to create, for example, must demonstrate that the facial "harms to competition . . . are outweighed by benefits that enhance competition."[7] And this is particularly true when the proposed combination is "between incumbent monopoly providers and possible rivals during . . . [the] initial period of implementation of the . . . [Telecommunications] Act."[8] Moreover, the analysis must encompass the competitive impacts of the proposed merger not only on competition during this initial period of implementation, but on the

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6 Id. at ¶¶ 2 - 3.

7 Id.

8 Id. at ¶ 4.

post-implementation market in which the merged entity would be providing in-region, interLATA service in both the SBC, including the Pacific Telesis Group ("PacTel") and the Southern New England Telephone Company ("SNET"), and Ameritech local service areas.

As the Commission has noted, the Communications Act "permits the Commission to impose [on a proposed merger of incumbent LECs] such conditions as are necessary to serve the public interest."[9] Thus, Section 214(c) of the Communication Act expressly empowers the Commission to attach to any approval "such terms and conditions as in its judgment the public convenience and necessity may require."[10] Properly construing "the Title II public convenience and necessity standard . . . 'to secure for the public the broad aims of the Communications Act'," the Commission has emphasized that "the public interest standard necessarily encompasses the goals of promoting competition and deregulation."[11] As such, "[t]he [Communications Act] public interest standard, and the competitive analysis conducted thereunder, are necessarily broader than the standard applied to ascertain violations of the antitrust laws," allowing for consideration of "trends within and needs of the industry, the factors that influences Congress to enact specific provisions for a particular industry, and the complexity and rapidity of change in the industry."[12]

Applying these standards in the context of the Bell Atlantic/NYNEX merger, the Commission cited as a potential harm to competition sufficient unto itself to warrant denial of the

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9 Id. at ¶ 29.

10 47 U.S.C. § 214(c).

11 Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 31.

12 Id. at ¶ 32.

proposed combination the elimination of not only a likely independent significant competitive provider within both the Bell Atlantic and NYNEX service areas of "local exchange and exchange access services, and unbundled local exchange, exchange access and long distance services," but an independent entity "possess[ed of] significant assets and capabilities that otherwise would enable it to compete with NYNEX [or Bell Atlantic, as applicable]."[13] As the Commission explained, the proposed combination would strengthen the incumbent's market power against competitive entry by a significant potential market participant and increase the likelihood of coordinated action among remaining market participants to increase prices, reduce quality or restrict output.[14] Thus, the Commission concluded that, without more, the potential harms to competition that would result from the Bell Atlantic/NYNEX merger outweighed the benefits that would purportedly flow from the combination. It was only because the applicants committed to a series of pro-competitive conditions that approval of the merger was possible and even then, the Commission remarked, the matter "remain[ed] a close case."[15]

Consistent with this assessment, the Commission emphasized that pro-competitive commitments would not necessarily carry the day in other contexts:

> Granting this application subject to conditions does not mean applicants will always be able to propose pro-competitive public interest commitments than will offset potential harm to competition. Nor would these particular conditions necessarily justify approval of another proposed merger for which applicants had not otherwise carried their burden of proof. . . . As competitive concerns increase, it becomes significantly more difficult for applicants to carry their

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13 Id. at ¶¶ 8 - 12.

14 Id. at ¶ 11.

15 Id. at ¶ 12.

> burden to show that the proposed transaction is in the public interest.[16]

Moreover, the Commission noted its concern that additional mergers involving large incumbent LECs could hinder its ability to "carry out properly its responsibilities to ensure just and reasonable rates, to constrain market power in the absence of competition, and to ensure the fair development of competition that can lead to deregulation," allowing greater opportunities for coordinated action among incumbents and depriving regulators of meaningful cross-carrier performance comparisons.[17]

B. The Regulatory Treatment of SBC/Ameritech Advanced Services Affiliates Proposed in the Merger Conditions Is Not Only Contrary to the Public Interest, but Is in Fact Unlawful

Easily the most dangerous and disturbing of the merger conditions proposed by SBC and Ameritech are those involving the regulatory treatment of SBC/Ameritech advanced services affiliates. As contemplated in the merger conditions, the combined SBC/Ameritech would provide advanced services – defined as "wireline, telecommunications services, such as ADSL, IDSL, xDSL, Frame Relay, Cell Relay and Dial Access Service that rely on packetized technology and have the capability of supporting transmission speeds of at least 56 kilobits per second in at least one direction"[18] – exclusively through one or more affiliates. Each such advanced services affiliate would be "regulated as a non-dominant carrier . . . with respect to the provision of Advanced

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[16] Id. at ¶ 15.

[17] Id. at ¶ 16.

[18] Proposed Conditions for FCC Order Approving SBC/Ameritech Merger (¶ 26), submitted by letter dated July 1, 1999, to Magalie Roman Salas, Secretary, Federal Communications Commission, from Richard Hetke, Senior Counsel, Ameritech Corporation, and Paul K. Mancini, General Attorney and Assistant General Counsel, SBC Communications Inc. (Proposed Conditions).

Services" and no such advanced services affiliate would be deemed to be "a successor or assign of a BOC for purposes of applying 47 U.S.C. § 153(4)(a)."[19] Moreover, the SBC/Ameritech advanced services affiliate would be able to (i) joint market its services with its parent on an exclusive basis; (ii) receive from its parent on an exclusive basis certain facilities and equipment used to provide advanced services, including "DSLAMS . . .,splitters . . . , packet switches and multiplexers . . . , modems . . . , and DACS frames;"[20] (iii) integrate its employees with those of its parent in the same building and on the same floors of such buildings; (iv) use its parent's name, trademarks, and service marks on an exclusive basis; (v) receive from its parent the parent's embedded base of customers; and (vi) secure, during a transitional period, interim line sharing capability from its parent on an exclusive basis. In TRA's view, these provisions are not only contrary to the public interest, but unlawful, and as such, should be summarily rejected.[21]

1. The Commission Cannot and Should Not Relieve The Merged SBC/Ameritech of its Statutory Resale Obligations

Section 251(h) provides that a "successor or assign" of a incumbent LEC will be deemed to be an incumbent LEC, as will an entity that "occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by [an incumbent LEC]" and that "has substantially replaced [an incumbent LEC]."[22] TRA submits that in the event an affiliate of an incumbent LEC provides a local service offering not provided by the

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19 Id. at ¶¶ 28, 36.

20 Id. at ¶ 27(c).

21 Id. at ¶ 16.

22 47 U.S.C. § 251(h).

incumbent LEC, it must be deemed to be either a successor or assign of, or a provider comparable to, the incumbent LEC for purposes of Section 251(h). Such an approach is particularly critical when the services the affiliate alone is offering provides an enhanced substitute for, and indeed, may ultimately render obsolete in given markets, key services the incumbent LEC offers.

In its *Non-Accounting Safeguards Order*, the Commission declined to impose Section 251(c) obligations on an incumbent LEC affiliate simply because it provided local exchange services within the incumbent LEC's local service area or to bar an incumbent LEC from transferring "key local exchange and exchange access services and facilities" to an affiliate.[23] The Commission nonetheless recognized that such actions raised "legitimate concerns" regarding the potential "eva[sion of] . . . section . . . 251."[24] The Commission, accordingly, ruled that "if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)," it would be deemed to be "an 'assign' of the BOC under section 3(4) of the Act with respect to those network elements."[25] The Commission did not, however, limit the scope of the terms "successor" and "assign" to an incumbent LEC affiliate to which the incumbent LEC has transferred ownership of a network element.[26]

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[23] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905, ¶ 309 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *remanded in part sub nom.* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* 12 FCC Rcd. 15756 (1997), *aff'd sub nom* Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997).

[24] Id. at ¶ 309.

[25] Id.

[26] Id. at ¶ 305 ("Thus, if an affiliate provided local exchange service through its own facilities or by reselling the BOC's local exchange service, it would *not necessarily* be classified as an incumbent LEC." (emphasis added)).

In TRA's view, treatment of an incumbent LEC affiliate as a "successor or assign" of, or a carrier "comparable to," an incumbent LEC is appropriate when, to borrow a phrase coined by BellSouth Corporation, the affiliate "takes on an essential attribute of an ILEC."[27] An affiliate of an incumbent LEC which is the sole provider, among the incumbent LEC and its affiliates, of advanced services has assumed the mantel of the incumbent as to these services. Thus, a customer desirous of acquiring advanced services from the incumbent LEC would have no choice but to deal with the affiliate. The incumbent LEC would have effectively assigned to the affiliate its right to provide advanced services and with respect to such services, the affiliate would occupy the position of the incumbent in the market, having replaced it as the incumbent provider of these services. Indeed, with respect to advanced services, the incumbent LEC would have exited the market. Moreover, given that the advanced services will substitute for, and ultimately render obsolete, certain traditional services the incumbent LEC will continue to offer, the incumbent LEC has essentially ceded to the affiliate its position in the market of the future.

The merged SBC/Ameritech should not be permitted to do indirectly that which it could not do directly. An incumbent LEC which declines through an affiliate to make a service available at wholesale rates for resale is restricting resale no less effectively than if it had directly refused to offer the service at wholesale. The Commission, for example, has recognized that if incumbent LECs were allowed to "avoid . . . [their] statutory resale obligation by shifting . . . customers to . . . [contract service arrangements ("CSA")]" and then "foreclosing resale of CSAs,"

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[27] Comments of BellSouth (at 15) submitted in CC Docket No. 98-39 on May 4, 1998.

local exchange competition would be hindered.[28] The Commission has further recognized that the ability of a carrier to refuse to provide resale opportunities is indicative of market power.[29] The Commission should not sanction here the use of a transparent means of avoiding resale. To the extent an affiliate of the merged SBC/Ameritech alone, rather than in addition to its parent, provides advanced services, it must be treated as an incumbent and required to make those services available to competitors pursuant to Section 251(c)(4).

2. Indirectly Relieving the Merged SBC/Ameritech of its Statutory Resale Obligations Would Conflict with Two Foundational Principles of the Telecommunications Act

Indirectly relieving the merged SBC/Ameritech of its statutory resale obligations as they relate to advanced services would stand in clear conflict with two of the foundational principles of the Telecommunications Act. The first such principal is that resale should serve as a viable entry option for new entrants, particularly smaller providers, into the local market. The second principal violated by the proposed merger condition is the Congressional directive that there must be an incumbent LEC for every geographic location and service offering. Both principles would be eviscerated by the proposed merger conditions.

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[28] Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd. 539, ¶224 (1997), *recon. pending, aff'd sub. nom.* BellSouth Corporation v. FCC, Case No. 98-1019 (D.C. Cir. December 28, 1998).

[29] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 939 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, 12 FCC Rec. 12460 (1997), *aff'd/vacated in part sub. nom.* Iowa Util. Bd v. FCC, 120 F.3d 753 (1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *aff'd/vacated in part sub. nom.* AT&T Corp., et al. v. Iowa Utilities Board, 119 S.Ct. 721 (1999).

As the Commission has repeatedly acknowledged, the Telecommunications Act "contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, *and resale.*"[30] The Commission has recognized that resale provides an interim entry vehicle for carriers that intend to deploy their own facilities, serves as a means for competitors to "reach customers in less densely populated areas," and, critically from TRA's perspective, constitutes "an important entry strategy . . . for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks."[31]

The Commission, accordingly, readily acknowledged its obligation "to implement rules that eliminate statutory and regulatory barriers and remove economic impediments" to resale as well as the other two "coequal" entry strategies, committing to ensure that "all pro-competitive entry strategies may be explored."[32] Consistent with this commitment, the Commission ruled that "[g]iven the probability that restrictions and conditions may have anticompetitive results, . . . it is consistent with the procompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable."[33] As the Commission explained, "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power."[34] The

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30 Id. at ¶ 12 (emphasis added).

31 Id. at ¶¶ 12, 32.

32 Id. at ¶ 12.

33 Id. at ¶ 939.

34 Id.

presumption so adopted, the Commission emphasized, was intended to "reduce unnecessary burdens on resellers seeking to enter local exchange markets, which may include small entities."[35]

The Commission, having committed to preserve resale as an entry vehicle particularly for smaller providers, now proposes to effectively abandon resale by indirectly relieving the merged SBC/Ameritech of their obligation to make some of the most marketable services available at wholesale rates for resale. Access to a full array of service offerings is obviously critical to resale carriers active in the local telecommunications market. As the Commission has recognized, anything that "prevent[s] a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs" stands as a significant obstacle to competitive viability.[36] "[E]limination of these obstacles is essential," the Commission has acknowledged, "if there is to be a fair opportunity to compete in the local exchange and exchange access markets."[37]

If resale carriers are denied the opportunity to acquire advanced services at wholesale rates for resale, they will be placed at a significant competitive disadvantage. A study conducted by the United States Telephone Association (the "USTA Report") offers the "extremely conservative estimate" that "[b]y year-end 2001, . . . between 10 and 11% of households" would subscribe to advanced telecommunications services."[38] Resale carriers would not only be unable to satisfy the advanced telecommunications needs of this high-end segment of the residential market (as well as

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35 Id.

36 Id. at ¶ 16.

37 Id. at ¶ 18.

38 Crandall, R. W., and Jackson, C. L., Eliminating Barriers to DSL Service," p. 27 (July, 1998) (submitted as an *ex parte* filing in CC Docket Nos. 98-146 and 98-147 by letter filed by Lawrence E. Sarjeant, Vice President Regulatory Affairs & General Counsel, dated August 12, 1998). Messrs. Crandall and Jackson base their estimate on an assumed monthly rate of $40 or less.

its equivalent on the business side), thereby being deprived of a critical revenue opportunity, but would likely be walled off from this market segment altogether.

Given that advanced services such as digital subscriber line ("xDSL") services provide both voice and data capability, an xDSL subscriber will have no need for POTS (plain old telephone service). As succinctly stated by the Commission, "[i]f ordinary citizens can access . . . ['highspeed, packet-switched'] networks at high speeds using existing copper wires, a variety of new services and vast improvements to existing services will be available."[39] In other words, a resale carrier offering only POTS would lose entire accounts, not just the data portions of such accounts, to carriers offering advanced services for want of a comparable service offering. And this would apply not only to new accounts, but existing accounts, undermining not only what existing competitive progress has been made to date in the local market, but competition in the interexchange market as well. "Customer control" would be ceded to the carrier that could provide the customer with advanced telecommunications service, jeopardizing existing customer relationships in not only the local, but the long distance market.

To the extent that advanced services render POTS obsolete for individual market segments, the universe of potential customers to which resale carriers that are denied the opportunity to acquire advanced services at wholesale rates for resale will be able to effectively market their services will continue to shrink. Resale will become a less and less effective means of entry into the local market and non-facilities-based resale carriers will become much less of a competitive force in the interexchange market.

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[39] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011, ¶ 7 (1998), *recon. pending, petition for review filed* U S WEST Communications, Inc. v. FCC, Case No. 98-1410 (D.C.Cir. April 5, 1999).

As noted above, the second foundational principal violated by the proposed regulatory relief is the Congressional directive that there must be an incumbent LEC for every geographic location and service offering. Implicit in the "three paths of entry into the local market" contemplated by Congress is that there would be in every geographic market and for every telecommunications service, an incumbent LEC through which to implement these strategies. Physical network interconnection cannot occur without an incumbent network with which to interconnect. Access to network elements cannot take place without an incumbent network to unbundle. And resale is a meaningless concept in the absence of retail services. Thus, Congress defined the term "incumbent local exchange carrier" to encompass not only all franchised wireline providers of local exchange service active on the date of enactment of the Telecommunications Act, but "successors and assigns" of such entities and any entity which occupies a "comparable" position in the market, and "substantially replaces," an incumbent LEC.[40]

The definition assigned to the term "incumbent local exchange carrier" reaches all existing franchised wireline LECs and any entity which assumes the mantle of the incumbent either with respect to a given geographic area or a specific service, assuring that there would always be retail services available at wholesale rates, network elements accessible on an unbundled basis and physical networks with which to interconnect. Moreover, Congress ensured through Section 10(d) that such retail services, network elements and physical network interconnections would remain available to competitors until Section 251(c) had been fully implemented and the Commission could determine that such availability was no longer necessary to ensure that services were offered on just,

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[40] 47 U.S.C. § 251(h).

reasonable and nondiscriminatory terms, to protect consumers, serve the public interest, and promote competitive market conditions.[41]

Under the merger condition proposed by SBC and Ameritech, there would be no incumbent LEC for the merged SBC/Ameritech's advanced services if an incumbent LEC elected to offer such services through an affiliate. The carefully crafted Congressional construct providing for resale at wholesale rates, unbundled network access and physical network interconnection would, accordingly, be eliminated. And the Congressional mandate that Section 251(c) obligations remain intact until Section 251(c) had been fully implemented would have been ignored..

3. The Commission Cannot Do Indirectly What It is Prohibited From Doing Directly

Section 251 is the linchpin of the Telecommunications Act. Capsulizing the purpose of the Telecommunications Act, the Conference Report refers to the "opening [of] all telecommunications markets to competition" as the engine for "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."[42] As recognized by the Commission, "the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets."[43] Section 251 is the mechanism provided by the Telecommunications Act for opening

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41 47 U.S.C. § 160(d).

42 S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Conference Report")

43 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 4.

the local exchange and exchange access markets to competition, described by the Commission as one of two "cornerstones of the framework Congress established in the 1996 Act to open local markets to competition."[44] As described by the Commission, "Section 251's primary purpose is to foster competition that otherwise would not likely develop in local exchange and exchange access markets."[45]

Confirming the central importance of Section 251, Congress predicated BOC entry into the in-region, interLATA market on the provision by a BOC of, among other things, (i) "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1);" (ii) "[n]ondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1);" and (iii) the availability of telecommunications services "for resale in accordance with sections 251(c)(4) and 252(d)(3)."[46] And perhaps most critically, Congress identified as one of only two limitations on the otherwise broad forbearance authority granted the Commission, a prohibition on Commission forbearance "from applying the requirements of section 251(c) . . . until . . . those requirements have been fully implemented."[47] In other words, in the view of Congress, the principle purpose of the Telecommunications Act will not be realized until Section 251(c) has been fully implemented. Or, as couched by the Commission:

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[44] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶ 73.

[45] Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Section 3(37) and 251(h) of the Communications Act; Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, 12 FCC Rcd. 6925, ¶ 41 (1997).

[46] 47 U.S.C. § 271(c)(2)(B).

[47] 47 U.S.C. § 160(d).

> The central importance of these provisions is reflected in the fact that they are the only two provisions that Congress carved out in limiting the Commission's otherwise broad forbearance authority under section 10.[48]

The Commission has acknowledged that it lacks the authority under either Section 401 or 706 of the Telecommunications Act[49] to forbear from strictly applying Section 251(c), noting that "section 10(d) expressly forbids the Commission from forbearing from the requirements of sections 251(c) and 271 'until it determines that those requirements have been fully implemented'" and that "[t]here is no language in section 10 which carves out an exclusion from this prohibition for actions taken pursuant to section 706."[50] Indeed, the Commission recognized that "the conclusion that section 706 does not provide the statutory authority to forbear from sections 251(c) and 271" will "further Congress' objective of opening all telecommunications markets to competition, including the market for advanced telecommunications."[51]

It goes without saying that the Commission may not do indirectly that which it is prohibited by statute from doing directly.[52] The Commission was not too long ago admonished by the U.S. Court of Appeals for the Eighth Circuit for violating this axiom. Thus, the Eighth Circuit faulted the Commission for seeking to exercise pricing authority through its Section 208 authority

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48 Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶ 73.

49 47 U.S.C. § 160(d); 47 U.S.C. § 157 (note); Pub. L. No. 104-104, 110 Stat. 56, § 706 (1996).

50 Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶¶ 69 - 79.

51 Id. at ¶ 76.

52 *See, e.g.*, Continental Air Lines, Inc. v. CAB, 522 F.2d 107, 115 - 16 (D.C. Cir. 1974).

to hear complaints against common carriers[53] and its Section 271 authority to review BOC applications for in-region, interLATA authority,[54] even though, according to the Court, the Commission was barred from doing so by Section 2(b) of the Communications Act of 1934, as amended ("Communications Act").[55] As described by the Court:

> The FCC's attempt to continue to exercise pricing authority through section 271 is reminiscent of its earlier attempt to do so through section 208. We rejected that attempt in our prior decision. As we noted in our prior opinion, section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b), as construed by the Supreme Court in *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), fences off intrastate matters from FCC regulation. . . . We held in our prior decision, and we reiterate today, that no section or subsection of the Telecommunications Act allows the FCC to break through that fence. We reject not only its attempt to utilize section 271(d)(3)(A), but also its attempt to utilize section 271(d)(3)(C) to accomplish this purpose. *The FCC may not accomplish indirectly that which we have held it may not do directly.*[56]

Here, the Commission is attempting to do precisely what Section 10(d) of the Communications Act does not permit it to do. It is proposing to relieve the merged SBC/Ameritech of its Section 251(c)(4) resale obligations as they relate to advanced services. Thus, having found that it lacks the statutory authority to forbear from enforcing these requirements under either Section 401 or 706 of the Telecommunications Act and having concluded that, even it if could so forbear, it would be a poor policy judgment to do so, the Commission proposes indirectly to allow the

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53 Iowa Util. Bd v. FCC, 120 F.3d 753, 803 - 04 (8th Cir. 1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *aff'd in part, rev'd in part on other grounds* AT&T Corp., et al. v. Iowa Utilities Board, 119 S.Ct. 721 (1999).

54 Iowa Util. Bd v. FCC, 135 F.3d 535 (8th Cir. 1998).

55 47 U.S.C. § 152(b).

56 Iowa Util. Bd v. FCC, 135 F.3d 535 at 541.

merged SBC/Ameritech to avoid this "cornerstone[] of the framework Congress established in the 1996 Act to open local markets to competition."[57] To use an old cliche, if it walks like a duck and quacks like a duck, it is a duck irrespective of what label is applied to it. Forbearance from applying and enforcing the mandate of Section 251(c), in whatever form such relief might take, is statutorily prohibited.

4. The Minimal Separation Required of the SBC/Ameritech Advanced Services Affiliate and its Parent Undermine any Suggestion that the Affiliate Would Not be an Incumbent LEC

In its *Notice of Proposed Rulemaking* addressing the provision of advanced services by incumbent LECs (*"Advanced Services NPRM")* , the Commission tentatively concluded that under certain "circumstances . . . an advanced services affiliate [of an incumbent LEC] would not qualify as an 'incumbent LEC' under the definition set forth by Congress in Section 251(h)," indicating that certain "structural separation requirements for advanced services affiliates" might be "sufficient for those affiliates to be deemed non-incumbent LECs."[58] While TRA strenuously disagrees with this tentative conclusion, the conclusion is predicated on separations requirements far more stringent than those proposed by SBC and Ameritech for their advanced services affiliates. The implicit logic underlying the Commission's tentative conclusion accordingly would require classification of the SBC/Ameritech advanced services affiliate as an incumbent LEC.

The Commission cited as among the elements of structural separation necessary to remove an incumbent LEC advanced services affiliate from the ambit of Section 251(c) the

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[57] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶¶ 69 - 79.

[58] Id. at ¶ 95.

requirement that "the incumbent must 'operate separately' from its affiliate," being barred, among other things, from "perform[ing] operating, installation, or maintenance functions for the affiliate."[59] In contrast, SBC and Ameritech propose not only to permit the merged SBC/Ameritech to provide "[c]ertain functionality associated with [advanced services] equipment" to its advanced services affiliate, but to "provide "operations, installation, and maintenance ("OI&M") services" to the affiliate as well.[60]

The Commission also recognized that the if an advanced services affiliate were to be deemed to be a non-incumbent LEC, its incumbent LEC parent could not discriminate in its favor "in the provision of any goods, services, facilities or information or in the establishment of standards."[61] SBC and Ameritech envision an entirely different construct. SBC and Ameritech would permit the merged SBC/Ameritech to deal with its advanced services affiliates on an exclusive basis, at least for some period of time, in the provision of (i) joint marketing opportunities, (ii) not only the functionality associated with advanced services equipment, but the advanced services equipment itself, (iii) use of name, trademarks and service marks, (iv) use of buildings and other general and administrative facilities, (v) interim line sharing capability, and (vi) access to embedded customer bases.

TRA submits that thus even under the unjustifiably relaxed separation requirements proposed by the Commission in its *Advanced Services NPRM*, advanced services affiliates of the

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59 Id. at ¶ 96.

60 Proposed Conditions at ¶¶ 27(b), (c).

61 Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶ 95.

combined SBC/Ameritech must be deemed to be incumbent LECs, fully subject to the Section 251(c)(4) resale obligations. The analysis, however, should not end here; special attention should be paid to the SBC/Ameritech proposal to allow advanced services affiliates to use the name, trademarks and service marks of the merged SBC/Ameritech on an exclusive basis.

As TRA argued in CC Docket No. 98-39, the corporate names, logos and service brands of the BOCs and other large incumbent LECs are extremely powerful competitive tools, having been pervasive presences in the marketplace, and a part of virtually every consumer's life, for decades. In fact, apart from their monopoly control of network facilities, name recognition and brand identification are the two must valuable competitive assets held by incumbent LECs. An advanced services affiliate of the merged SBC/Ameritech using the name, trademarks and service marks of its parent would derive the benefit of the name recognition and good will accrued by SBC and Ameritech as the decades-long exclusive providers of local service within their combined service areas, appearing to consumers as a mere extension of the merged SBC/Ameritech. Accordingly, any pretense of competitive equality between the advanced services affiliates of the combined SBC/Ameritech and alternative providers of advanced services would be lost if the advanced services affiliate were allow to market its service under the name and service marks of the combined SBC/Ameritech. In the public's perception, the advanced services affiliate would be the incumbent LEC with respect to the provision of advanced services. And the Commission has long held that customer perception is a critical consideration in determining the regulatory treatment of entities and services.[62]

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[62] *See, e.g.*, Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790 (D.C. Cir. 1982).

5. The Minimal Separation Required of the SBC/Ameritech Advanced Services Affiliate and its Parent Undermine Would Not Produce any Meaningful Public Interest Benefit

Structural safeguards always look viable on paper and always work effectively in theory. In the real world, however, such safeguards seldom, if ever, provide the envisioned protections. When applied to entities as large as the merged SBC/Ameritech, they are generally defeated by not only the enormity, but the complexity, of the operations involved. Given the myriad means of evading regulatory constraints and the small likelihood of detection, structural safeguards will be ineffective absent a good faith effort by SBC and Ameritech to comply. And given the enormous incentives on the part of SBC and Ameritech to evade statutory and regulatory requirements, such good faith compliance is little more than a hope and a dream.[63] If good faith compliance were in the cards, both SBC and Ameritech would currently be providing interLATA service within their respective "in-region States," because each would have promptly complied with all elements on the 14-point "competitive checklist." As it is, both entities continue to actively resist competitive entry and, long past the third anniversary of the enactment of the Telecommunications Act, still have yet to remove fundamental economic and operational barriers to entry which they were required by law to eliminate more than three years ago.

Accordingly, if structural separation is to be effective as a safeguard against anticompetitive abuses, incentives to evade statutory and regulatory obligations must be eliminated. Strengthening structural safeguards may increase incrementally the difficulty of evasion or raise

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[63] As Judge Greene wrote a number of years ago, "[w]here the Regional Companies have been permitted to engage in activities because it appeared to the Court that the likelihood of anticompetitive conduct was small, they have nevertheless already managed to engage in such conduct, albeit necessarily on a limited scale." United States v. Western Electric Co., 767 F. Supp. 308 (D.D.C. 1991).

incrementally the risk of detection, but the overall impact will be minimal. Neither the Commission nor its regulatory counterparts in the States now have, or will ever have, the resources necessary to render structural safeguards effective without voluntary compliance by the merged SBC/Ameritech. Accordingly, if structural separation is to be effective, the benefits of evasion must be reduced to a point at which countervailing benefits or costs outweigh them. In other words, safeguards must be structured to ensure that compliance by the merged SBC/Ameritech is in its self interest.[64]

TRA submits that the only way to achieve this end is through separation of ownership. Ownership by the merged SBC/Ameritech of an advanced services affiliate, or common ownership of the merged SBC/Ameritech and an advanced services affiliate, ensures that the business interests of both entities will be furthered by evasion of not only the structural separation, but the obligation to fully open local markets to competition. In such a circumstance, both the merged SBC/Ameritech and the advanced services affiliate would benefit from discrimination aimed at unaffiliated competitive providers. Any hope of rendering structural separations effective, therefore, lies in the majority of the stock in the advanced services affiliate being held apart from the merged SBC/Ameritech and its stockholders. While separate public ownership of a majority of the outstanding stock in the advanced services affiliate does not guarantee that the merged SBC/Ameritech and the affiliate will not act in concert to thwart competition, it does significantly reduce the incentives to do so and greatly increases the risk of detection.

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[64] Lest the Commission have any doubts regarding the likelihood of good faith compliance by the merged SBC/Ameritech with separations requirements to which the component companies committed, it should look to violations by SBC in the context of its merger with SNET. *See* SBC Communications Inc. (Consent Decree), FCC 99-153 (released June 28, 1999).

Separate public ownership of an advanced services affiliate, coupled with independent officers, directors and mangers, will activate enforceable Securities and Exchange Commission reporting obligations and create fiduciary duties with respect to the independent stockholders. More importantly, separate public ownership of the majority of the stock will, at least potentially, vest control of the advanced services affiliate in hands other than those of the merged SBC/Ameritech, a prospect which could be enhanced by precluding the merged SBC/Ameritech from controlling a majority of the board of directors of the affiliate. TRA agrees with the Commission that the advanced services affiliate must be "truly separate" if structural safeguards are to be effective,[65] but submits that "true separation" requires separation at the ownership, as well as the management, operational and economic, levels.

C. The Remaining Merger Conditions Must Be Modified To Mitigate The Competitive Harms That Would Be Occasioned By The Merger Of SBC And Ameritech

The remaining merger conditions proposed by SBC and Ameritech can be divided into four relatively distinct categories: (i) pro-competitive conditions which generally require some measure of enhancement to accomplish their intended purpose; (ii) conditions which merely restate existing requirements, which the Commission could unilaterally impose, or which could be imposed on the basis of existing records in current Commission proceedings; (iii) conditions which simply confirm the inevitable working of market forces; and (iv) pro-consumer conditions which, while laudible, do not impact the competitive calculus. TRA submits that even if modified so as to be

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[65] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶ 92.

rendered more effective, the remaining proposed merger conditions are inadequate to counter-balance the competitive harms that would be occasioned by the proposed merger of SBC and Ameritech. Unmodified, the remaining merger conditions provide, at best, minimal mitigation of these harms. Coupled with the Section 251 relief embodied in the regulatory treatment proposed by SBC/Ameritech of advanced services affiliates, however, the package of merger conditions overall is potentially worse than the imposition of no merger conditions whatsoever, particularly for smaller carriers attempting to compete through local service resale.

1. Certain Merger Conditions, While Pro-competitive, Require Some Measure of Enhancement to Accomplish Their Intended Purpose

A number of the merger conditions proposed by SBC and Ameritech would, at least theoretically, have a pro-competitive impact, mitigating to some extent the competitive harms that would be occasioned by the SBC and Ameritech merger. Unfortunately, many of these commitments are themselves so conditioned that their pro-competitive impacts would be negligible. If, however, these limitations were lifted, or at least minimized to some extent, these merger conditions could serve to counter-balance, at least in part, some of the adverse impacts of the SBC/Ameritech merger.

Additional Resale Discounts

TRA views as a generally positive action, the SBC/Ameritech commitment to increase wholesale discounts to 32 percent.[66] Per-state caps on the number of lines subject to these discounts, restriction of the additional discounts to residential service, and imposition of a relatively short offering window for the additional discounts will all, however, serve to severely limit any pro-

[66] Proposed Conditions at ¶¶ 47, 49.

competitive impact of this condition. For example, the combined state caps for the combined SBC/Ameritech region total less than four percent of the aggregate access lines currently served by SBC and Ameritech, allowing the increased wholesale discounts little room to have any meaningful competitive impact.[67]

Likewise restricting the additional discounts to residential consumers, and excluding small business users, limits the competitive impact of the additional discounts because of the difficulty of sustaining residential resale as a stand-alone market. Among TRA's local carrier members, resale is being used to provide 94 percent of the residential service being offered. Yet, residential service still comprises little more than 20 percent of the competitive local services being provided by TRA's local carrier members.[68] Accordingly, even with the additional discount, a sustainable local resale business for a small provider will still require a weighted service mix of small business and residential consumers. Thus, limiting the additional discounts to residential users, who, from a telecommunications perspective, have traditionally been a less neglected group than small business users, severely reduces the value, at least to smaller carriers.

Finally, limiting the offering window for the additional discounts to a maximum of two years, and potentially a far shorter period, serves only to further reduce the competitive impact of the additional margin. And, although, given the limited margins currently available to local service resale carriers, TRA's local carrier members cannot afford to reject the replacement "1.1

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[67] Federal Communications Commission, Preliminary Statistics of Communications Common Carriers, 1998 Edition (May, 1999).

[68] Telecommunications Resellers Association, 1998 Reseller Membership Survey and Statistics, 9 - 11 (July 1998); Telecommunications Resellers Association, Implementation of the Telecommunications Act of 1996, A-4 (submitted to the Committee on Commerce of the U.S. House of Representatives on December 1, 1998).

times" discount, let there be no doubt that an increase of this limited magnitude would have a paltry impact on carriers' bottom lines. In this respect, the Commission should bear in mind that among TRA's local carrier members, 65 percent report net margins from total service resale of zero percent or less.[69]

If SBC and Ameritech are offering additional wholesale discounts as something more than mere window dressing, TRA recommends that they (i) eliminate, or at least greatly increase, the state-specific caps, (ii) expand the universe of consumers to for which the additional discounts are available to include at least small business – *e.g.,* one to ten or twenty lines – users; and (iii) eliminate, or least significantly expand, the offering window for the additional discounts. TRA further recommends that the Commission take this opportunity to ensure that the merged SBC/Ameritech make advanced services available at wholesale rates for resale pursuant to Section 251(c)(4). Currently, neither SBC nor Ameritech are offering advanced services at statutory discounts for resale, even though, as TRA has elsewhere demonstrated, such services are being offered by both entities at retail to subscribers who are not telecommunications carriers.[70]

End-to-End UNE Combinations

TRA likewise views as a generally positive action, the SBC/Ameritech commitment to offer end-to-end combinations of unbundled network elements ("UNEs"), although, as with the additional resale discounts offered by the merging carriers, the conditions imposed on this

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[69] Telecommunications Resellers Association, Implementation of the Telecommunications Act of 1996 at A-8..

[70] *See* Letter, dated April 27, 1999, from Ernest B. Kelly, III, President, Telecommunications Resellers Association, to William E. Kennard, Chairman, Federal Communications Commission, and attached Report, submitted as an *ex parte* presentation in CC Docket No. 98-147.

commitment will severely limit any pro-competitive impact.[71] The above analysis of the proposed additional resale discounts applies with equal force to the per-state caps on the number of lines that would be available through the SBC/Ameritech UNE platform, as well as to the restriction of the UNE platform's use to residential service, and the relatively short offering window imposed upon the UNE platform's availability. SBC and Ameritech, however, further exacerbate the impact of these limitations with respect to the UNE platform by imposing the additional restrictions that the UNE platform cannot be used either in conjunction with discounted loops or to provide access services or advanced services.

Once again, if SBC and Ameritech are offering the UNE platform as something more than mere window dressing, significant modifications will be necessary. TRA recommends that SBC/Ameritech (i) eliminate, or at least greatly increase, the state-specific caps, (ii) expand the universe of consumers for which the UNE platform may be used to provide service to include at least small business – *e.g.*, one to ten or twenty lines – users; (iii) eliminate, or least significantly expand, the offering window for the UNE platform; (iv) eliminate the prohibitions against use of discounted loops in conjunction with the UNE platform; and (v) eliminate the prohibitions against use of the UNE platform to provide access services or advanced services.

Additional Unbundled Local Loop Discounts

The SBC/Ameritech commitment to offer additional discounts on unbundled loops is also seen by TRA as a generally positive action.[72] Once again, however, SBC and Ameritech have

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71 Proposed Conditions at ¶¶ 48, 49.

72 Id. at ¶ 46.

severely limited the pro-competitive impact of this commitment by conditioning it so heavily. The per-state caps applicable to the additional unbundled loop discounts are substantially lower than even those for the additional resale discounts, the additional unbundled loop discounts, like the additional resale discounts, are limited to residential service, and the offering window for the additional unbundled loop discounts is no greater than that for the additional resale discounts. SBC and Ameritech compound the dampening effect of these conditions by requiring use of the discounted unbundled loops in conjunction with a competitor's own switching facilities, rendering the additional discounts unavailable to smaller non-facilities-based carriers, and by prohibiting the use of discounted loops in the provision of access services and advanced services.

Again, if SBC and Ameritech are sincere in offering the additional unbundled loop discounts as a means of mitigating the competitive harm that would be occasioned by their merger, significant modifications will be necessary. TRA recommends that SBC/Ameritech (i) eliminate, or at least greatly increase, the state-specific caps, (ii) expand the universe of consumers to for which the discounted unbundled loops may be used to provide service to include at least small business – *e.g.,* one to ten or twenty lines – users; (iii) eliminate, or least significantly expand, the offering window for the additional unbundled loop discounts; (iv) eliminate the prohibition against use of discounted loops in conjunction with local switching offered by the merged SBC/Ameritech; and (v) eliminate the prohibition against use of discounted loops to provide access services and advanced services.

OSS: Assistance for Small CLECs

TRA views as a positive action SBC's and Ameritech's proposal to establish teams of operations support services ("OSS") experts to assist small competitors in utilizing OSS functionalities.[73] One of the persistent problems faced by small competitors in dealing with incumbent LECs has been a persistent "hide-the-ball" approach, particularly with respect to the pre-ordering, ordering and provisioning of service, the obtaining of necessary repairs, and the billing of resold services. Answers to queries are far too often incomplete, inaccurate or non-responsive, with the proverbial "read the manual" being a continuing favorite. Multiple teams of OSS experts dedicated to providing meaningful assistance could go a long way toward resolving these concerns. The proof of the pudding, however, is in the eating. Teams of OSS experts will only advance the process if they indeed take as their mission the creation of efficient working relations, rather than continuation of obfuscation tactics in a different guise. Absent such a change in mind set, little will be accomplished simply by designating additional personnel to work with smaller providers. TRA also recommends that the OSS experts work with smaller carriers that have executed resale agreements, as well as those which have executed interconnection agreements.

OSS: Enhancements and Additional Interfaces

SBC and Ameritech commit to a number of actions intended to render more workable the merged entity's OSS functionalities. [74] Among other things, SBC and Ameritech commit to develop and deploy through out the combined SBC/Ameritech region (excluding Connecticut)

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[73] Id. at ¶ 19.

[74] Id. at ¶¶ 8 - 17.

commercially ready, uniform application-to-application interfaces using standards and guidelines adopted in industry forums, providing for the involvement of competitors and establishing milestones for realization of this end with monetary penalties for noncompliance. SBC and Ameritech further commit to provide direct access to SBC's SORD system (and the Ameritech and SNET equivalents thereof) for ordering processing, to develop and deploy enhancements to the existing EDI interface for OSS that support maintenance, and to develop and deploy enhancements to existing Datagate and EDI interfaces for pre-ordering and ordering components to be used to provide digital DSL and other advanced services, as well as interim access to SBC's Complex Product Service Order System ("CPSOS") for loop pre-qualification information. Finally, SBC and Ameritech commit to develop and deploy either (i) a software solution to ensure the consistency of competitor-submitted local service requests with the business rules of the merged SBC/Ameritech or (ii) uniform business rules for completing competitors' local service requests.

TRA's reservations with respect to these merger conditions are twofold. First, many of the proposed enhancements will not be available for one year, two years and up to three years. The competitive harm that will be occasioned by the combination of SBC and Ameritech during this developmental period obviously could be substantial. The question then is can this damage be undone in the years that follow deployment, a difficult assessment given that for many smaller carriers an interim period of two to three years would be an eternity. TRA is also concerned with respect to the open ended potential cost assessments that could be levied on competitors in conjunction with the development of a number of the proposed OSS enhancements, including enhanced access to service order processing- and maintenance/repair-related OSS.

TRA, however, commends SBC and Ameritech for providing for the involvement of competitors in the developmental process and for the assessment of monetary fines in the event of delay, although TRA does not endorse the relatively limited caps on these forfeitures. TRA also supports SBC/Ameritech's efforts to introduce uniformity, greater efficiency, and enhanced accessibility into the OSS process, as well as to undertake actions designed to facilitate consistency between local service requests submitted by competitors and the business rules of the merged SBC/Ameritech.

OSS: Waiver of Charges

Another potentially positive proposal put forth by SBC and Ameritech is a waiver of all charges for use of the merged entity's standard electronic interfaces for accessing OSS that support pre-ordering, ordering, provisioning, maintenance/repair and billing.[75] Particularly given that certain other incumbent LECs have recently begun imposing charges for such electronic access, TRA commends SBC and Ameritech for its movement in a more pro-competitive direction. Particularly given the limited margins available for local service resale, high order submission fees can quickly turn a positive return into a negative one. TRA is, however, disappointed that SBC and Ameritech have not extended the waiver to encompass, or at least committed to cap the charges applicable to, non-electronic methods of transmitting orders. Use of facsimile order submission is still common among smaller carriers and new market entrants, and, accordingly, imposition of charges, particularly high fees intended to deter the use of manual order submission, for such order processing can dampen both competitive entry and activity. TRA is also concerned with the broad

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[75] Id. at ¶ 18.

flexibility SBC and Ameritech propose to retain for themselves regarding the recovery of the costs associated with OSS development and provision.

Agreements: Out-of-Region and In-Region

SBC and Ameritech offer several positive proposals implicating out-of-region interconnection agreements entered into by competitive LEC affiliates of the merged SBC/Ameritech and in-region interconnection agreements negotiated by the merged SBC/Ameritech with competitors.[76] Unfortunately, the pro-competitive impact of these proposals is dampened significantly by undue conditions. Thus, for example, neither the out-of-region or in-region proposals appear to extend to resale agreements and resold services. Likewise, neither the out-of-region or in-region proposals encompass matters of price. In-region arrangements subject to the proposal are not only limited to those voluntarily negotiated by the merged SBC/Ameritech, thereby excluding arrangements imposed through arbitration, but are of restricted duration, unilaterally limited to the term of the underlying agreement. In-region arrangements subject to the proposal also require competitors to accept what SBC/Ameritech deem to be "related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreements."

A number of these limitations, including those excluding resale arrangements, imposing duration limits, and requiring the acceptance of related terms and conditions, are actually more restrictive than those contemplated by Section 252(i).[77] Thus, for example, Section 252(i)

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[76] Id. at ¶¶ 51, 52.

[77] 47 U.S.C. ¶ 252(i).

includes "services," as well as "interconnection" and "network elements."[78] Likewise, Section 252(i) allows competitors "to choose among individual provisions," and does not require acceptance of what an incumbent might deem to be a related term or condition reflective of "corresponding compromises."[79] And Section 252(i) allows competitors to avail themselves of such individual provisions for a "reasonable time," without reference to the term of an underlying agreement.[80]

To ensure that these agreement-related merger conditions have a meaningful pro-competitive impact, TRA recommends that restrictions related to resale, available services, and agreement origin and duration be eliminated, and that the flexibility sought by SBC/Ameritech to couple provisions associated with what it believes to be "corresponding compromises" be limited.

Agreements: Regional

SBC and Ameritech also propose to enter into regional interconnection and resale agreements.[81] Other incumbents have followed this course and it has proven to be a cost-effective means for small multi-state providers to structure their service arrangements.

Alternative Dispute Resolution

SBC and Ameritech have proposed dispute resolution procedures which appear to be designed to streamline and expedite the resolution of carrier-to-carrier disputes.[82] TRA views this

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78 47 U.S.C. ¶ 252(i).

79 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 1310.

80 Id. at ¶ 1319.

81 Proposed Conditions at ¶ 53.

82 Id. at ¶ 50.

approach as a favorable development, being well aware that lengthy and resource-intensive arbitration and litigation work against the interests of small providers.

2. A Number of the Merger Conditions, While Pro-competitive, Merely Restate Existing Requirements, or Accept Obligations Which the Commission Could Unilaterally Impose, or Which Could Be Imposed on the Basis of Existing Records in Current Commission Proceedings

A number of the merger conditions proposed by SBC and Ameritech merely restate existing requirements, or accept obligations which the Commission could impose unilaterally or on the basis of existing records in current Commission proceedings. For example, SBC and Ameritech commit to "provide collocation consistent with governing Commission rules," offering only to supplement these requirements through use of an independent auditor to verify compliance.[83] The carriers also commit variously to "provide unaffiliated CLECs with nondiscriminatory, electronic pre-order OSS access to the same loop pre-qualification information that is available to SBC/Ameritech's retail operations," to "provide CLECs . . . with the same nondiscriminatory, electronic pre-order Internet access to the same loop pre-qualification information for xDSL services that is available to SBC/Ameritech's retail operations," and to "provide CLECs . . . nondiscriminatory access to loop pre-qualification information."[84] TRA submits that what amounts to a mere restatement of existing obligations imposed by the Congress and the Commission on all incumbent LECs, even if supplemented to increase the likelihood of full compliance, cannot be used to offset competitive harms occasioned by an SBC/Ameritech combination. With or without the

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[83] Id. at ¶¶ 3 - 7.

[84] Id. at ¶¶ 21, 22, 23.

merger, SBC and Ameritech have an obligation to provide collocation in conformance with Commission directives and to provide nondiscriminatory access to OSS functionalities to competitors in conformance with Congressional mandates. The carriers should not be afforded additional benefits simply for doing that which they are required by law to do.

SBC and Ameritech further offer to implement a Federal Performance Parity Plan which will provide for a variety of performance measurements and quarterly reports of monthly performance, as well as liquidated damages and payments to public interest funds for noncompliance.[85] While generally a positive development, imposition of reporting requirements and monetary forfeitures is well within the Commission's authority to impose unilaterally and, therefore, voluntary acceptance of such reporting requirements and penalties cannot be relied upon to offset the competitive harm that would be occasioned by an SBC/Ameritech combination. The same holds true for SBC/Ameritech's commitment to offer shared transport, in conjunction with local switching,[86] to continue to provide unbundled access to its network,[87] and to comply with Commission pricing rules.[88] Records exist in current Commission proceedings to support Commission imposition of each of these ongoing obligations, rendering all "sleeves-off-the-vest" offerings by SBC and Ameritech. SBC and Ameritech cannot bargain with cards that they do not hold.

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85 Id. at ¶¶ 1 - 2.

86 Id. at ¶¶ 41 - 42.

87 Id. at ¶¶ 43.

88 Id. at ¶¶ 44.

3. A Central Merger Condition -- Implementation of SBC's National-Local Strategy -- is a Market-Driven Phenomenon

As TRA argued in its original comments addressing the proposed SBC/Ameritech merger, SBC acknowledged early-on that each of it and Ameritech would be driven by business necessity to either combine or to compete against one another at least in the major local service markets served by the other as the incumbent. As described by SBC in its application to assume control of Ameritech:

> SBC believes that it is critical to do so in order to serve the needs of the large and mid-size business customers that will form the base or 'anchor' for this entry and establish 'first mover' advantages.
>
> To that end, the new SBC will also deploy over 60 new switches in the first stage of its plan just to serve large and mid-size businesses. . . . Within three years of closing the proposed merger, SBC plans to have at least two switches within each of the 30 new markets.
>
> To that end, the new SBC will deploy an additional 80 switches in the 30 out-of-region markets to serve residential and small business customers.[89]

And, SBC made clear, it had little choice but to pursue such a strategy:

> As our customers expand, both domestically and internationally, and begin to focus on securing all or substantially all of their telecommunications services from a single source, we could either stand pat and run the risk of losing our large and mid-size customers, who though small in number represent a very large portion of our revenues, or we could expand and compete for the opportunity to follow and serve our customers wherever they might be.
>
> SBC and Ameritech believe that, absent such a widespread, simultaneous, facilities-based, out-or-region and global entry, they will not be able to compete effectively with the other major

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[89] Description of the Transaction, Public Interest Showing and Related Demonstrations at 13 - 16.

> companies that can now provide a full range of telecommunications services to the large and mid-size business customers located in SBC's and Ameritech's in-region areas. Frankly, SBC and Ameritech have found that, if they remain confined to their regions and engage in only incremental out-of-region expansion, they will be able to compete less effectively for the large and mid-size business customers that are looking to have all (or substantially all) of their service needs met by a single carrier.[90]

Accordingly, in offering to fulfill SBC's National-Local Strategy, SBC and Ameritech are committing to do that which they had already determined the market gave them no choice but to do. No countervailing credit can flow from such a predetermined result in assessing whether the merger conditions offered by SBC and Ameritech compensate for the competitive harms their combination would occasion.

4. Certain Merger Conditions, While Laudable, will have no Competitive Impact

Several of the merger conditions proposed by SBC and Ameritech reflect laudable public interest objectives, but do not have an associated competitive impact. Thus SBC and Ameritech commit to deploy advanced services capability in local income areas,[91] to refrain from charging residential customers a minimum monthly or minimum flat rate charge on interLATA long distance services,[92] and to offer enhanced Lifeline discounts.[93] TRA commends SBC and Ameritech for volunteering such commitments. But commitments of this nature cannot offset competitive harms and should not be used for this purpose.

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90 Id. at 3 - 4, 6.

91 Proposed Conditions at ¶ 20.

92 Id. at ¶ 59.

93 Id. at ¶ 60.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association continues to urge the Commission to withhold approval of the proposed merger of SBC Communications Inc. and Ameritech Corporation. In TRA's view, SBC and Ameritech have failed to propose merger conditions which adequately counter-balance the competitive harm that would be occasioned by their combination. In the event, however, that the Commission elects to sanction the proposed merger, TRA strenuously implores it to reject those merger conditions which would effectively relieve the merged SBC/Ameritech of its Section 251(c)(4) resale obligations and to modify those merger conditions which potentially could have a pro-competitive impact in a manner which would facilitate realization of this end.

Respectfully submitted,

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July 19, 1999

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CERTIFICATE OF SERVICE

I, Enica Lewis, do hereby certify that a true a correct copy of the foregoing document has been served by the First Class Mail, postage prepaid, on the individuals listed below, on this 19th day of July, 1999.

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